SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 518

ANNIE MARY TIMMONS, *Petitioner,*

v.

THE SOUTH CAROLINA TRICENTENNIAL COMMISSION AND DANIEL R. MCLEOD, as Attorney General of the State of South Carolina, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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THE SOUTH CAROLINA TRICENTENNIAL COMMISSION AND DANIEL R. McLEOD, as Attorney General of the State of South Carolina, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Annie Mary Timmons, petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Fourth Circuit, dismissing the appeal of the petitioner, from an order for remand by the United States District Court for South Carolina, at Columbia.

ORDERS BELOW

No opinions were rendered by the Courts Below. The order of the court of appeals (App. A, p. 1a, *infra*). The order of the District Court (App. B, pp. 2a-3a, *infra*). Petition in District Court. (App. C, pp. 4a-5a, *infra*).

JURISDICTION

The order of the Court of Appeals was entered on Feb. 17, 1970. Petitioner's motion for rehearing was denied on March 13, 1970. Petitioner's motion for stay of mandate was granted March 25, 1970. Chief Justice Burger signed an order extending the time for writ of certiorari to the Circuit Court of Appeals to August 10, 1970, inclusive. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Did the appeals court err when it dismissed the petitioner's appeal, from the District Court's order of remand, by misapplying and misconstruing 28 U.S.C.A. 1447(d), to the end that petitioner's guaranteed constitutional rights were violated and her property taken without due process of law, where U.S. Treasury funds are used in payment for condemnation properties, under the United States Constitution, Amendment V and Article III, Sections 1 and 2.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution provides pertinent parts as follows:

Amendment V.

"... Nor be deprived of, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Article III. Section 1.

"The Judicial Power of the United States, shall be vested in one Supreme Court," . . .

Section 2.

"The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *; to controversies to which the United States shall be a party; and between a State, or the citizens thereof, . . ."

STATEMENT

This is a federal and state condemnation civil proceeding, in that it involves United States Treasury funds in payment for land and several hundred modern furnished rental apartments in four separate 3 story brick buildings, with new modern equipped restaurant, all situate on the premises and in use, the earnings and income from said rentals, providing the petitioner with her livelihood.

This action initially arose for specifically condemning this property and buildings thereon under a special statutory provision applicable to the petitioner and her several rental properties by the South Carolina General Assembly, Spring Session of 1969. The petitioner owns in title fee simple, all of the properties both real, personal and rental-earnings therefrom, and the U.S. District Court for South Carolina at Columbia, has at all times had jurisdiction of this action, because substantial direct federal constitutional questions are involved, including U.S. Treasury funds, provided by HUD for the condemnation payments, supposedly, under open Space Land Program, Sec. 401 et Seq. of the Housing and Urban Development; and also federal agencies and instrumentalities, are directly involved.

There is a diversity of citizenship, and forceful taking of private property, for supposedly public use and necessity, but no proven evidence, is of record of this condemnation claim or its ultimate use or disposition; and all without due process of law and without just and adequate compensation to replace properties and earnings. U.S. Constitution Amendment V, Article III, Secs. 1 and 2. Moreover the controversy between the parties in this jurisdictional case exclusive of interests and costs, exceeds the sum or value of Ten Thousand ($10,000.00) Dollars, of which the District Court of South Carolina has original jurisdiction.

The petitioner pointed out in her petition, for removal to the trial district court, in which the federal and state condemnation of rental properties and the parties involved, were within that original jurisdiction of that court, that substantial federal questions are involved, under the constitution and laws of the United States, regarding the unconstitutionality of a special act of the State of South Carolina for this sole purpose, against the petitioner, all of which as above cited, required the convening of a special three federal judge constitutional tribunal pursuant to the provisions of 28 U.S.C.A. secs. 2281-2284.

In a one day appearance on Nov. 25, 1969, the petitioner's petition for removal was denied, and the trial court refused to assume jurisdiction of the various federal constitutional questions aforementioned and entered an order for remand on Nov. 26, 1969, to the state court of general jurisdiction, including all the federal and U.S. Constitutional questions raised therein. (Vol. 1, App. B, pages 1, 20-22, Cert. Appeal Record.)

Any delay in petitioner's filing her petition for removal, was due to her illness and her inability to obtain

counsel for this purpose earlier, both of which were beyond her control. However this alone, which was proper and sufficient justification, should not prove fatal to the trial court assuming jurisdiction of the federal and United States constitutional questions involved and presented, and requiring the trial court's consideration and jurisdiction, because the time for filing a petition for removal has been held not to be essential to the jurisdiction, the provision on the subject is but modal and formal.

The district trial court, ordered the petitioner's case for removal precipitatiously remanded after short of a one day appearance of the parties, to the South Carolina court of general jurisdiction, citing 28 U.S.C.A. 1447. (App. B, pp. 2a-3a, *infra*).

On December 24, 1969 petitioner filed a notice of appeal to obtain a review of the order of the trial court in refusing to assume jurisdiction of all of the federal questions. Mandate herein for Stay was approved by the court of appeals and filed on March 25, 1970, pending application of the petitioner to the Supreme Court of the United States for a writ of certiorari to the Court of Appeals for the Fourth Circuit. Chief Justice Burger signed an order extending the time to file for the Writ to August 10, 1970, inclusive.

REASONS FOR GRANTING THE WRIT

1. Petitioner urges that the order of the court of appeals, dismissing the petitioner's appeal from the trial court's order of remand compounded the erroneous determinations made and the erroneous order of the district court, by the misapplication and misconstruction of 28 U.S.C.A. 1447(d) (App. A, *infra*, page A-1)

2. Petitioner contends, both the appeals and trial court orders below, were a violation of petitioner's guaranteed federal rights, and the forceful taking of her private properties without due process of law, and without just and reasonable compensation, where United States Treasury funds, were used in payment of these condemned properties. Moreover federal constitutional questions are directly involved and irrevocably interlocked in this appeal to this court. Constitution of the United States of America, Amendment V, Article III, Sections 1 and 2.

3. 28 U.S.C.A. 1447(d) cited by the court of appeals, as well as the other provisions of the code mentioned herein, have been amended by the Congress in numerous enactments, as late as July 2, 1964 and otherwise, and is reviewable on appeal by this Court, as novel and unique questions, heretofore, not passed on or decided by this court, under the same set of facts and circumstances involved here. Therefore, the questions presented here have not been settled by this court. Moreover there is nothing in this entire record of petitioner's case to evidence any sort of delay of the proceedings of condemnation or to precipitate or foster any kind of litigation in the protection of her rights and income producing property. All of petitioner's facts have never been adduced in a trial court of record.

4. The trial court below remanded the petitioner's case for trial under 28 U.S.C.A. 1447 without itself complying with all its pertinent and required provisions for a hearing, and in so doing committed a harsh abuse of judicial discretion beyond reason, and a misuse of the judicial process, and a disregard of the federal and constitutional questions involving substantial rights thereunder, when it refused to assume

jurisdiction of these landmark federal issues presented, 28 U.S.C.A. Sec. 2281-2284.

5. Petitioner contends and respondent admits that U.S. Treasury funds are used in payment of the condemnation properties, involved in this appeal and owned by the petitioner in fee simple title, both real estate and the four apartment rental unit buildings. In addition the Secretary of Housing and Urban Development is on written record herein, as advising the petitioner, that in use of these federal funds in payment of the condemnation properties, that there must not be any violation of Federal procedures, and that all federal statutes and regulations must absolutely be complied with. Sec. 401 et Seq., Housing and Urban Act of 1965, as amended.—Proceedings, Published No. OS-5. Petitioner contends that it is a matter of record the aforesaid have not been complied with, though an investigation was ordered by HUD officials but no report of the results have been obtainable or published. See certified record on appeal and proceedings on appeal; two volumes 4th C.C.A. July 2, 1970 for use of Supreme Court in appeal.

6. The landmark of the due process of law, is the opportunity to be heard and the right to a trial in a Court of proper jurisdiction, but petitioner has been denied this right, specifically as to her guaranteed federal constitutional rights, and taking of her properties and earnings from rental therefrom, without due process, where federal questions and issues are directly involved, by payments with U.S. Treasury money in the condemnation. Moreover the petitioner's request for a federal trial; argument by personal appearance and filing of formal printed briefs on these substantial federal constitutional questions before the lower courts

pursuant to the rules and statutes and decisions, have been denied, on a technicality of refusing jurisdiction. All appearances before the court of appeals were disposed of by motions without any oral presentation or argument thereon, or any printed brief on the issues allowed, though requested by the petitioner.

7. Petitioner is entitled to the protection of the Fifth Amendment, and by this Court granting the Writ to the Fourth Circuit court of appeals, would certainly settle the federal constitutional condemnation question presented, and afford a guideline in future federal and state condemnation proceedings where U.S. treasury funds are used in payments of the condemned properties exclusively, under U.S. Constitutional and federal statutes, including HUD.

8. Based on the foregoing authorities and reasoning, petitioner respectfully submits, when the lower trial district court refused to assume jurisdiction in this case, such action was a prejudicial error of law, violation of her United States Constitutional rights, abuse of judicial discretion and misapplication and misconstruction of the judicial process. In addition as a matter of record herein, it was specifically a failure of the trial court to completely comply with the Federal rules of Appellate procedure and the U.S.C.A. in the petition for removal, requiring a three federal appeal tribunal, as requested, for a hearing on the United States Constitutional questions involved and presented, the number of days required under the rules and the code; and the federal constitutional questions were likewise disregarded. Moreover the trial court in disposing of petition for removal in less than one day, observed in its order that all parties in the condemnation proceedings were not included in the re-

moval petition, which made it defective, citing the omission herein of Home Federal Savings and Loan Assoc., holder of the first mortgage on petitioner's properties, and who was a party to the condemnation proceedings below. Petitioner contends that the trial court after taking judicial notice of this party omission, aforesaid, should have ordered of its own volition that Home Federal be made a party forthwith, since federal funds in payment, agencies and instrumentalities, had their funds guaranteed, protected and secured, to certain amounts.

9. The petitioner further points out here that the district trial judge stated in his remand order that "I am not ruling on whether a federal issue is involved, for none appears in the proceeding before me." Petitioner wants this federal issue passed on in this appeal. In spite of this statement in his order, the trial court had just finished observing that "it would be necessary for the Association, meaning Home Federal Loan and Savings Assoc. to be made a party thereto. "28 U.S.C.A. 1441." (Appendix 13, p. 2a, *infra*) This trial court ruling was obviously erroneous on its face, because such an assertion in an order of this importance is clearly a federal issue, among the many others heretofore cited by petitioner of record, and the trial court should have made Home Federal a party for the reasons aforestated.

10. Petitioner concedes that the formal omission of the party Home Federal Savings and Loan Assoc. from the removal petition was an oversight and inadvertent error as caught by the trial court and under and pursuant to established and settled federal law, should have taken judicial notice. The trial judge should have made the Home Federal entered a party along with the peti-

tioner, since both were also being sued against their wishes. This alone, demands jurisdiction of a federal issue, and where supported by U.S. Treasury money in condemnation payments and the Fifth Amendment and agencies and instrumentalities, where the full faith and credit of the U.S. government, in certain guarantees of funds are involved. Petitioner, prays that this Court now make the Home Federal Savings and Loan Association a party to this appeal and proceedings, who holds the first mortgage over petitioner's properties in this condemnation payment, with federal funds, exclusively.

CONCLUSION

Because the order of the appeals and trial court below, refuses to decide a novel and unsettled federal question, with certain conflicts and possibly against public policy, payments in condemnation with United Treasury funds, involving, also, HUD, the United States Constitution, questions of federal law—these questions should be settled by this Court, the petition for certiorari should be granted.

Respectfully submitted,

GERARD HARTZOG
714 Southern Building
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Counsel for Petitioner

APPENDIX A

[Filed February 17, 1970]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,342

THE SOUTH CAROLINA TRICENTENNIAL COMMISSION and DANIEL R. McLEOD, as Attorney General of the State of South Carolina, *Appellees*,

v.

ANNIE MARY TIMMONS, *Appellant*.

Order Dismissing Appeal

It appearing to the panel of the Court (consisting of Judges Craven, Butzner and the undersigned), to which appellees' motion to dismiss the appeal and appellant's response thereto was assigned, that appellant has sought an appeal from an order specifically nonappealable under 28 U.S.C.A. § 1447(d) and that, therefore, appellees' motion should be granted, it is

ORDERED, that the appeal is hereby dismissed.

For the Court:

s/ HARRISON L. WINTER
United States Circuit Judge

SEAL

A True Copy, Teste:
SAMUEL W. PHILLIPS, *Clerk*

By MARGARET P. JOHNSON
Deputy Clerk

APPENDIX B

[Filed November 26, 1969]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION No. 69-1002

THE SOUTH CAROLINA TRICENTENNIAL COMMISSION and DANIEL R. McLEOD, as Attorney General of the State of South Carolina, *Plaintiffs*,

v.

ANNE MARY TIMMONS, *Defendant*.

Order

Plaintiffs have moved before this Court for an order remanding this case to the Court of Common Pleas of Richland County, South Carolina, the state court of general jurisdiction in which this condemnation action was commenced in June of 1969.

The case has been set for trial in that court on Monday, December 1, 1969, and a pretrial hearing was scheduled in that court for November 25. Just prior to the commencement of that hearing, Defendant's attorney filed a petition and notice in this court for the removal of this case to the United States District Court. In her petition for removal, Defendant asked for the convening of a three-judge federal court pursuant to 28 USC 2281 through 28 USC 2284.

On June 10, 1969, this petitioner (who is the landowner in the condemnation action) commenced an equitable proceeding in the Court of Common Pleas for Richland County to test the validity of the condemnation proceeding which had already been commenced in the same court. That proceeding was heard by the state circuit judge on August 19, and he refused to issue an injunction halting the condemnation proceeding. That order is on appeal to the South Carolina Supreme Court.

Once the petitioner selected her forum for testing the validity of the condemnation action, that court acquired jurisdiction, and that jurisdiction became exclusive. *U.S. v. 625.91 Acres of Land in Dunklin County, Mo.*, 49 F. Supp. 997; *Midwest Video v. Campbell*, 250 F. Supp. 158.

Home Federal Savings and Loan Association, which holds a mortgage over the landowner's property, was made a party along with the landowner in condemnation proceeding, but the Association was not named in the removal petition. It would be necessary for the Association to join in the removal petition or be made a party thereto; this has not been done and would be grounds for remand. *Heatherington v. Allied Van Lines, et al.*, USDC, S. C., 1961, 194 F. Supp. 6; *Halsey v. Minnesota-South Carolina Land & Timber Co.*, 54 F. 2d 933.

But these issues need not be the basis for remand, for the sole issue necessary for decision is whether or not there has been compliance with the requirements of the removal procedure. 48 USC 1441 through 1447.

It affirmatively appears from the state court records which were produced in court that more than 30 days have elapsed since the filing of this action in the state court, and there is nothing showing a waiver or any excuse or justification for a delay in filing the removal petition. 28 USCA 1446. I am not ruling on whether a federal issue is involved, for none appears in the proceeding before me.

It Is Accordingly Ordered that this case be remanded to the Court of Common Pleas for Richland County, South Carolina, for trial. 28 USCA 1447.

Donald S. Russell
Donald S. Russell
United States District Judge

Columbia, South Carolina
November 26, 1969

APPENDIX C

[Filed November 25, 1969]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION NO. ———

THE SOUTH CAROLINA TRICENTENNIAL COMMISSION and DANIEL R. McLEOD, as Attorney General of the State of South Carolina, *Plaintiffs*,

v.

ANNIE MARY TIMMONS, *Defendant*.

Petition

TO THE HONORABLE THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION:

The petition of the Defendant would respectfully show:

1. That the above entitled action has been instituted by the Plaintiffs against your Petitioner by the service of a Notice on the —— day of ———, 19 —, and is now pending in the Court of Common Pleas for Richland County, State of South Carolina, located within the above named division of this Court; that no answer is required by law to be filed or served by the Defendant and none has in fact been filed or served; that said action is now pending a jury trial set for December 1, 1969 at 10:00 A.M. in said Court of Common Pleas for Richland County.

2. That this action is a special statutory proceeding, of a civil nature, to wit, the condemnation of real estate, located within the jurisdiction of this Honorable Court and owned by this Defendant, and that the matter in controversy between the Plaintiffs and your Petitioner, exclusive of interest and costs, exceeds the sum or value of Ten

Thousand ($10,000.00) Dollars, as is alleged in the attached file in the above entitled action, of which the District Courts of the United States have original jurisdiction.

3. That your Petitioner files herewith in this Court a copy of the file in the above entitled action so far as is known to your Petitioner and her undersigned attorney who has just commenced representation of the Petitioner in this action.

4. That very substantial Federal questions are involved in the above entitled action, including but not limited to, questions arising under the Constitution and Laws of the United States regarding the unconstitutionality of certain Statutes of the State of South Carolina and of this action against the Petitioner pursuant thereto, requiring the convening of a Special Constitutional Tribunal consisting of three Federal Judges pursuant to the provisions of sections 28-2281 to 28-2284, U. S. C. A.

5. That your Petitioner files and offers herewith a bond with good and sufficient surety in the sum of Five Hundred ($500.00) Dollars conditioned that the Defendant will pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that the case was not removable or was improperly removed.

WHEREFORE, your Petitioner prays that this Petition and said Bond be accepted as sufficient for removal of the said action to this Court.

Dated at Columbia, S. C.
November 25th, 1969.

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Arthur T. Cole
3808 Verner St.
Columbia, S. C. 29204
Attorney for Defendant

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SUPREME COURT, U. S.

FILED
AUG 31 1970
E. ROBERT SEAVER, CLERK

IN THE

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NO. 518

ANNIE MARY TIMMONS, *Petitioner*,

v.

THE SOUTH CAROLINA TRICENTENNIAL COMMISSION AND DANIEL R. McLEOD, as Attorney General of the State of South Carolina, *Respondents*.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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NO. 518

ANNIE MARY TIMMONS, *Petitioner*,

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THE SOUTH CAROLINA TRICENTENNIAL COMMISSION AND DANIEL R. MCLEOD, as Attorney General of the State of South Carolina, *Respondents*.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the United States District Court of South Carolina and the Circuit Court of Appeals are set out in the Appendix of Petitioner's brief; both opinions passed on the question of remand of the condemnation action to the State Court.

JURISDICTION

Jurisdiction is based upon 28 USC 1254(1), but no grounds for granting the Writ of Certiorari are presented.

QUESTION PRESENTED

The sole question presented below was whether the case should have been removed to the federal courts.

STATUTES INVOLVED

The sole statute involved is 28 USC 1446 (a), (b), (d) and (e), Procedure for Removal. On appeal 28 USC 1447 (d) was cited as authority for the dismissal of the appeal.

STATEMENT

The South Carolina Tricentennial Commission, a body created by the General Assembly of South Carolina, commenced on June 6, 1969, an eminent domain proceeding in the Court of Common Pleas for South Carolina to take certain lands of the Petitioner pursuant to an act granting this Commission that power. The lands were being taken as a part of the Tricentennial exhibition site and for use as a park after 1970.

On June 10, 1969, Petitioner commenced an action in the same state court to enjoin the condemnation proceedings and test the constitutionality of the Act under which the Commission was proceeding. The state court ruled on all constitutional issues raised in that proceeding adversely to

the Petitioner and an appeal was taken to the Supreme Court of South Carolina.

Certain pre-trial proceedings thereafter took place in the condemnation action, and the Supreme Court of South Carolina on November 13, 1969, refused to stay the condemnation proceeding pending the appeal in the case testing the constitutionality of the Act and the proceedings.

On November 25, 1969, less than a week before the date set for the trial of the condemnation action, Petitioner filed a Petition for removal of the condemnation case to the United States District Court of South Carolina. (Appendix C, Petition)

The Commission, in a hearing on the same date before United States District Judge Donald S. Russell, moved to remand the case to the state trial court. On November 26, Judge Russell remanded the case to the state court (Appendix B, Petition).

Petitioner then appealed from Judge Russell's order to the United States Court of Appeals for the Fourth Circuit. On Respondents' motion to dismiss the appeal, that appeal was dismissed under 28 USC 1447 (d).

The condemnation action proceeded to trial in December and resulted in an award of $325,000 to the Petitioner; both proceedings (the equitable action testing the validity of the condemnation and the condemnation action) were appealed to the South Carolina Supreme Court which affirmed. An appeal to this court from that decision has been noticed by Petitioner. (No. 19074, South Carolina Supreme Court)

ARGUMENT

Petitioner's petition repeatedly refers to U. S. Treasury funds and the Open Space Land Program under the Housing and Urban Redevelopment Act.

No ruling on that Act was made during the trial, and there is nothing in the record in this proceeding or in the entire case record which relates to this Act. HUD funds

are being used in part for payment of these properties, but the only way HUD has been involved is the HUD requirement that the lands acquired with these federal funds be used "for park and recreational purposes, conservation of land and other natural resources, or historic or scenic purposes." (Record, injunctive proceeding, p. 60-61). The state act provided that land acquired with participating HUD funds be "used for park purposes." (Record, injunctive proceeding, p. 110)

Whether or not this act has been complied with is not involved in this proceeding, the sole issue being whether or not the case should have been removed.

As Judge Russell properly observed, the Petitioner selected the state court as the forum to test the validity of the proceedings, and that jurisdiction thereby became exclusive. Had she elected to test the act before a federal tribunal, that would have been her right, but the Petitioner elected otherwise.

The petition was defective in not making the lienholder a party, and this would also have been a basis for remand.

These were not the bases, however, for Judge Russell's ruling; the statute for removal sets 30 days as the time within which a petition for removal can be filed. There must be the requisite grounds, and Petitioner asserts that there is diversity of citizenship. Petitioner is a citizen of South Carolina, and the Commission is a part of the government of the same state.

But that is not the basis for the Court's remand of the case to the State Court; the 30-day requirement was not complied with, and Judge Russell had no course but to remand the case under 28 USC 1446. Such an order, is not appealable under 28 USC 1447 (d).

CONCLUSION

The reasons which Petitioner has cited for granting the writ involve issues not raised in this proceeding which was concerned with the sole issue of removal of the case to the

federal court; were Petitioner's procedure allowed, any litigant could avoid trial by shifting a case at the last moment to a federal court.

The procedure for removal prescribes time limits for this reason; those procedures not having been observed, there was no basis for removal, and the remand order was appropriate.

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August 25, 1970.